

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

LESLIE GREEN, Personal Representative of the  
Estate of Timothy Dorton, Deceased, LESLIE  
GREEN and DAVID DORTON, Individually,

Plaintiffs-Appellees,

V

STEPHEN KNAZIK, D.O., STEPHEN KNAZIK,  
D.O., P.C., and CHILDREN'S HOSPITAL OF  
MICHIGAN,

Defendants-Appellants.

---

UNPUBLISHED  
July 31, 2003

No. 233482  
LC No. 98-804549-NH

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment entered in favor of Plaintiff, Estate of Timothy Dorton<sup>1</sup>. We affirm.

Plaintiff filed this wrongful death action alleging that acts of medical malpractice were committed by defendant Dr. Knazik<sup>2</sup> at defendant Children's Hospital, resulting in the death of plaintiff's decedent, Timothy Dorton (Timothy).<sup>3</sup> Timothy was taken to the emergency room at Children's Hospital on March 9, 1996 by his mother, Leslie Green, and his grandmother, Debra Green, because he had been vomiting and had diarrhea. Dr. Knazik examined Timothy and discharged him later that afternoon. Timothy was pronounced dead in the Children's Hospital Emergency Room at 4:36 a.m. on March 10, 1996. Plaintiff alleges that Timothy died from

---

<sup>1</sup> A two count complaint was filed against defendants. In Count I, the Estate of Timothy Dorton asserted a claim for medical negligence under the wrongful death act. Count II of the complaint alleged bystander claims, individually, on behalf of Leslie Green (decedent's mother) and David Dorton (decedent's father). The case was submitted to the jury and the jury returned a verdict, however, on Count I only. Hereafter, then, the term "plaintiff" refers solely to the Estate of Timothy Dorton.

<sup>2</sup> When used in the singular, the term "defendant" refers to Dr. Knazik.

<sup>3</sup> Timothy died one day before he was to turn 14-months old.

dehydration that defendant failed to diagnose. Defendants asserted that Dr. Knazik was not negligent, that Timothy was not dehydrated when he was discharged by Dr. Knazik, but instead Timothy became dehydrated sometime after being released from Dr. Knazik's care.

At the close of plaintiff's proofs, defendants moved for directed verdict on the basis that plaintiff failed to present expert testimony establishing a breach of the requisite standard of care. The trial court denied the motion. The case was presented to the jury, which returned a verdict in favor of Plaintiff. Judgment entered for plaintiff in the amount of \$990,911.87. Defendants moved for judgment notwithstanding the verdict, new trial and/or remittitur, asserting that plaintiff had failed to present testimony that the standard of care had been breached, and that pursuant to MCL 600.1483, plaintiff could not recover in excess of \$280,000.00 in damages for noneconomic loss. This motion was also denied by the trial court.

On appeal, defendants raise three issues. Defendants first claim that the trial court erred when it concluded that plaintiff had presented sufficient evidence of a breach of the standard of care and denied their motions for directed verdict and judgment notwithstanding the verdict. We review de novo the trial court's decision on a motion for directed verdict or motion for judgment notwithstanding the verdict. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). We review the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party to determine whether the evidence fails to establish a claim as a matter of law. *Id.*

We conclude that plaintiff presented sufficient evidence that Dr. Knazik breached the applicable standard of care. In a medical malpractice case, expert testimony must be presented that establishes both the applicable standard of care, and that it was more likely than not that the defendant breached that standard. *Wiley v Henry Ford Cottage Hosp*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 233220, issued 7/10/03), slip op at 3. Plaintiff's expert, Dr. Bachman, testified that in his opinion, the notes recorded in the decedent's medical chart did not reflect that Dr. Knazik took an adequate history of the patient, and that this failure to obtain an adequate history constituted a breach of the standard of care. Dr. Bachman also opined that the notes in the medical chart did not support the conclusion reached by Dr. Knazik that dehydration could be ruled out, and that Dr. Knazik's failure to diagnose the degree of the decedent's dehydration and supply adequate treatment for the same was also a breach of the standard of care.

Defendants attack this testimony as no more than a criticism of the adequacy of the charting which, without more, is insufficient to establish a breach of the standard of care. Defendants further contend that the testimony of Dr. Knazik and Leslie Green establishes that Dr. Knazik's examination of decedent was well within the standard of care and sufficient to rule out dehydration at the time of the examination. A health care professional's failure to keep adequate records is not a breach of the standard of care unless the failure contributes to the patient's injuries. *Boyd v Wyandotte*, 402 Mich 98, 104-105; 260 NW2d 439 (1977); *Zdrojewski v Murphy*, 254 Mich App 50, 64; \_\_\_ NW2d \_\_\_ (2002). However, the "failure to keep adequate records may raise issues regarding credibility or burden of persuasion." *Zdrojewski, supra* at 64.

Here, plaintiff asserts not that Dr. Knazik's record keeping methods contributed to decedent's death, but rather that the inadequate charting is *evidence* that Dr. Knazik failed to conduct a complete examination and render the proper treatment, and that if he had done a

comprehensive examination within the standard of care, this examination would have would have revealed that decedent was dehydrated at the time of the examination. Testimony by plaintiff's causation witnesses, that because decedent died within twelve hours of being examined by Dr. Knazik, he was more likely than not dehydrated at the time of the examination, supports Dr. Bachman's opinion that despite Dr. Knazik's testimony that he conducted an examination within the standard of care, decedent's death from dehydration twelve hours later supports a contrary conclusion.

Moreover, Dr. Knazik's testimony about the examination was based on his asserted custom and practice, since he had little independent recollection of his examination of decedent. The sufficiency of the charting, then, is highly relevant in regard to the credibility of Dr. Knazik's testimony about this particular examination. Thus, reviewing the evidence and inferences from the evidence in the light most favorable to plaintiff, we conclude that the trial court did not err by denying defendants' motions for directed verdict and judgment notwithstanding the verdict.

Defendants next assert that the trial court erred in finding that the medical malpractice noneconomic damages cap imposed in MCL 600.1483 is unconstitutional. We agree. We review issues of constitutional law de novo. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *McDougall*, *supra* at 24. In *Zdrojewski v Murphy*, 254 Mich App 50, 74-82; 657 NW2d 721 (2002), this Court squarely addressed this issue and found the noneconomic damages cap in MCL 600.1483 to be constitutional. Thus, pursuant to *Zdrojewski*, the trial court's ruling that the statute is unconstitutional must be reversed.

Defendants last contend that the trial court erred by not applying the medical malpractice noneconomic damages caps found in MCL 600.1483 to the jury verdict here. We disagree. This Court reviews questions of statutory interpretation de novo. *Jenkins v Patel*, 256 Mich App 112, 113-114; 662 NW2d 453 (2003). In *Jenkins*, this Court held that in a wrongful death action filed under the Michigan wrongful death act (WDA), MCL 600.2922, the WDA governs the award of noneconomic damages arising out of a death caused by medical malpractice, thereby precluding the application of the medical malpractice cap found in MCL 600.1483. Applying *Jenkins* to the facts herein, we find that the trial court did not err by declining to apply the medical malpractice noneconomic damages cap to the verdict returned by the jury in this case.

For the foregoing reasons, we affirm.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kurtis T. Wilder